No. 91-1092

IN THE

*SUPREME COURT OF THE UNITED STATES*

OCTOBER TERM, 1991

BEEKMAN PAPER CO.,

*Petitioner*

*v.*

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,

*Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should *certiorari* be granted to review the Court of Appeals' decision that the District Court was correct to deny a motion to remand because regardless of whether all defendants were properly served, the failure of all defendants to join the petition for removal based on diversity was curable, where diversity was not defeated, all defendants consented to removal and the plaintiff made no showing of prejudice?

## PARTIES TO THE PROCEEDING

The parties to the proceedings below all appear in the caption of this case. Pursuant to Rule 29.1 of this Court, Crane & Co., Inc. states that it has no parent company and that the following subsidiary is not wholly owned:

Technical Graphics, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF OF RESPONDENTS IN OPPOSITION

# I

## COUNTERSTATEMENT OF THE CASE

### *Preliminary Statement*

Respondents, Crane & Co., Incorporated ("Crane"), and Richard W. Kerans, Thomas A. White, and Hamilton Davis (collectively the "Individual Defendants"), respectfully request that this Court deny the petition for a writ of *certiorari* of Beekman Paper Company, Inc. ("Beekman") to review the judgment of the United States Court of Appeals for the Second Circuit (the "Petition")[1]. It is respectfully submitted that this case does not merit Supreme Court review. Petitioner has utterly failed to demonstrate "special and important reasons" for granting *certiorari*, as required by the Rules of the United States Supreme Court. Accordingly, the Petition should be denied.

### *Counterstatement Of Facts*

The Statement of the Case presented in the Petition contains numerous misstatements of fact, includes much irrelevant material, and misstates and omits holdings of the Court of Appeals and the District Court. Rather than restate the facts, however, few of which are relevant to the Petitioner's asserted grounds for *certiorari*, Crane and the Individual Defendants adopt and incorporate herein the statements of facts contained in the District Court's opinions, dated

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1 Citations to the Petition appear herein as "Pet. at _."

February 13, 1991 and February 28, 1991, which are reprinted at pages RA-1 and RA-4, respectively, of Respondents' Appendix.[2]

## A. BASES FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The Petition's statement of the bases for federal jurisdiction in the District Court is incorrect. Petitioner cites 28 U.S.C. §§ 1446 and 1447 as the bases for federal jurisdiction below. However, these statutes merely govern the procedures for removal to the federal district court. The District Court had jurisdiction over the case pursuant to 28 U.S.C. § 1332, on the grounds that complete diversity between the parties exists, and the amount claimed to be in issue exceeds $50,000, exclusive of interest and costs. The District Court also had jurisdiction pursuant to 28 U.S.C § 1441 which permits removal on the grounds of diversity of citizenship, if none of the defendants is a citizen of the state in which the action is brought.

## B. THE DECISIONS BELOW

The District Court denied Petitioner's motion to remand. Both the District Court and the Court of Appeals found the issue of whether the Individual Defendants had been properly served to be irrelevant. The District Court, relying on *Browne Bros. Cyper. Corp. v. Carver Bank of Miami, Fla.*, 287 F. Supp. 700, 702 (S.D.N.Y. 1968), found that as to any of the Individual Defendants

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2 Petitioner has failed to comply with Rule 14(k) of this Court which requires its Appendix to include a copy of both the Court of Appeals opinion sought to be reviewed and the District Court opinions in the case. As Petitioner has failed to include the District Court opinions in its Appendix, Respondents have attached these opinions hereto.

who had not been served at the time the removal petition was filed, failure to join the removal petition did not defeat removal.[3]

In addition, both the District Court and the Court of Appeals found that even assuming, *arguendo*, that the Individual Defendants had been properly served, their failure to join the petition for removal was a curable defect that was not time-barred. Petitioner's Appendix ("PA") at 4; RA at 2. Both courts cited *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 652 (S.D.N.Y. 1978) for this proposition. *Id.* In agreeing that the petition for removal could be amended to include the Individual Defendants, the Court of Appeals stated that "the defect is curable, especially in the absence of any showing of prejudice to plaintiff." PA at 4.

## C. THE ISSUE BEFORE THIS COURT

The only issue before this Court is whether the Court of Appeals correctly decided that the Individual Defendants' failure to join the removal petition was a curable defect, where diversity existed, all defendants consented to removal, and plaintiff was not prejudiced by the removal. While Respondents continue to believe that only properly served defendants must join a petition for removal, and that in this case the Individual Defendants were not properly served, this argument was deemed irrelevant by the Court

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3 Following its denial of Petitioner's motion to remand, the District Court denied Petitioner's motion for a preliminary injunction, and granted Respondents' motion to dismiss, holding, *inter alia*, that the distributorship arrangement between the parties was unenforceable under the Statute of Frauds. RA at 6-8.

of Appeals, and thus should be irrelevant before this Court.[4] *See Youakim v. Miller*, 425 U.S. 231, 234 (1975) ("'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed'") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Petitioner nevertheless clutters its Petition with arguments that the Individual Defendants were properly served. Petitioner would have this Court believe that had the Court of Appeals reached the issue of whether the Individual Defendants had been properly served, the result below would have been different. However, as discussed, *supra*, the Second Circuit's holding is supported by *Sicinski*, which held that a served, non-signatory defendant would be permitted to cure a defective petition for removal by amending the petition to include its signature, even though the time for seeking removal had passed. *See also Pepsico, Inc. v. Wendy's International, Inc.*, 118 F.R.D. 38, 42 (S.D.N.Y. 1987) ("a statement of grounds for removal may be clarified through amendment even after passage of the 30 days for filing the petition").

More importantly, as the Court of Appeals did not deem it necessary to consider this issue, it is not properly before this Court. *See Youakim*, *supra*. Even if the courts below *had* addressed the issue of whether service was properly effected, it would not be appropriate for this Court to review such a wholly fact-based inquiry. *See National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981)

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4 It should be noted that there is some disagreement among district courts regarding whether 'service' means 'proper service' in the removal context. *Compare Love v. State Farm Mut. Auto. Ins.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982) to *Tyler v. Prudential Ins. Co.*, 524 F. Supp. 1211 (W.D. Pa. 1981). No Court of Appeals has yet decided this issue. In any event, this disagreement is not before this Court.

(where Court is "presented primarily with a question of fact, [this] does not merit Court review"); *United States v. Johnston*, 268 U.S. 220, 227 (1924) ("We do not grant a *certiorari* to review evidence and discuss specific facts").

## II

## NO SPECIAL OR IMPORTANT REASONS EXIST WHICH WARRANT CERTIORARI REVIEW

This case does not present the "special and important reasons" necessary to justify granting a writ of *certiorari*. Moreover, none of the traditional reasons for *certiorari* review is present here. The Second Circuit's decision does not conflict with the decision of any other circuit court, nor with any decision of the Supreme Court. The decisions cited by Petitioner in support of its Petition are readily distinguishable on the questions of law and on the facts presented in those cases. Finally, this case presents no important or unsettled issue of federal law warranting this Court's review.

### A. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT

The cases on which Petitioner relies to support its argument that the Court of Appeals' decision is in conflict with a decision of this Court or of other Courts of Appeal are, at best, inapposite. The few Supreme Court cases and one circuit court case cited by Petitioner

which touch upon the removal issue in no way conflict with the Court of Appeals' decision below.[5]

In *Kinney v. Columbia Savings & Loan Ass'n*, 191 U.S. 78 (1903), relied upon by the Petitioner, this Court construed an earlier version of the removal statute which required proof of diversity to appear on the face of complaint. Although the plaintiff had not met this requirement, the *Kinney* court nevertheless *affirmed* the decree of the district court denying the motion to remand, because the failure to comply with this requirement did not prejudice the plaintiff. This result is completely consistent with the Court of Appeals' holding in this case, which upheld the District Court's denial of Petitioner's motion to remand in the absence of any showing of prejudice to Petitioner.

*Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2d Cir. 1988), cited by Petitioner, is also consistent with the Court of Appeals' decision herein. In *Synergy*, the Second Circuit *retained* jurisdiction of the case, finding that the removal petition had been timely filed.[6]

Furthermore, neither the result in *Synergy* or that in *Kinney* would affect the Court of Appeals' decision in this case, which was based on the only case on point - - *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649 (S.D.N.Y. 1978). Petitioner completely mischaracterizes *Sicinski*, claiming that it is a case in which "the attorney simply forgot to sign the permission to remove." Pet. at

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5 In addition, none of the district court decisions cited by Petitioner address the issue relevant to this case, namely, whether defendants who have consented to removal may cure a possibly defective petition to include their signature.

6 Indeed, the results in both *Synergy* and *Kinney* contradict Petitioner's statement to this Court that "[a]ll the authorities cited herein for removal speak concurrently [sic] to remand." Pet. at 10 n.8.

10. In *Sicinski*, however, one of two named *defendants* failed to sign the removal petition, and the district court permitted this defendant to file an affidavit consenting to removal after the 30-day filing period had expired. Accordingly, the Court of Appeals' decision is not inconsistent with any decision of this Court or any Court of Appeals. Rather, it is consistent with all of the cases cited by Petitioner, and follows from the precedent relied upon by the Court of Appeals.

## B. THIS CASE DOES NOT RAISE AN IMPORTANT ISSUE OF UNSETTLED FEDERAL LAW

Dissatisfied with the adverse decisions of the District Court and the Court of Appeals, Petitioner protests that its case raises federalism concerns to which this Court should now turn its attention. Petitioner has failed to cite any authority for this proposition, and, in fact, there is none. In any event, the Court of Appeals' decision does not offend federalism. Federalism is not even an issue here.

Complete diversity exists between the parties in this case. PA at 3; RA at 2-3. Thus, pursuant to Article III, Section 2 of the United States Constitution, jurisdiction over this case vests in the federal courts. As the District Court clearly had jurisdiction over this case, the case does not present an affront to federalism. The only issue presented is whether the Respondents complied with the technicalities of the removal statute, 28 U.S.C. § 1446.

Federal statutory law has permitted removal of actions from state to federal court for decades. *See* Jud. Code § 28 (1911), 28 U.S.C. § 71 (1940); 28 U.S.C. §§ 1441, 1446, 1447. Removal is simply a mechanism by which a case over which a federal court has jurisdiction is transferred from state to federal court. Removal from

state to federal court is appropriate only if the initial question -- that of whether federal jurisdiction is proper at all -- has been answered in the affirmative. Removal typically raises federalism concerns when a question exists as to the existence of original jurisdiction in the federal courts, or whether removal is available at all and not when the only issue deals with the mechanics of removal. *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (removal improper because federal court did not have original jurisdiction); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) (remanding action when no federal jurisdiction existed because complaint did not present issue "arising under" federal law); *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941) (cited by Petitioner) (plaintiff against whom counterclaim is asserted cannot remove action it brought in state court). *See also American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1950) and *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), both cited by Petitioner, finding removal improper where the federal court did not have original jurisdiction.

In this case, complete diversity exists, thus making federal jurisdiction proper. The only question remaining is whether, on the facts of this case, the Respondents complied with the removal statute. This is hardly an important federal question. *See National Labor Relations Board, supra; Johnston, supra.*

## CONCLUSION

For the reasons stated above, Respondents respectfully request that Beekman Paper Company's Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit be denied.

Dated: January 31, 1992

Respectfully submitted,

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# RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BEEKMAN PAPER COMPANY, INC., :

Plaintiff, : 91 Civ. 0031 (LMM)

-against- : MEMORANDUM AND ORDER

CRANE & CO., INCORPORATED, RICHARD W. KERANS, THOMAS A. WHITE, and HAMILTON DAVIS, :

Defendants. :

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McKENNA, D.J.

Plaintiff moves to remand this action to the Supreme Court of the State of New York, New York County, on the ground that all served defendants did not join in the petition for removal. *See, e.g., Committee of Interns v. N.Y. State Labor Relations Board*, 420 F. Supp. 826, 832 (S.D.N.Y. 1976). For the reasons set forth below, the motion is denied.

The removal petition was filed by defendant Crane & Co. on January 2, 1991. The petition states, as to each of the three individual defendants, that he has not been served. Plaintiff has submitted affidavits of service on such individual

defendants, who, in turn, submit affidavits contesting service. Mr. White, claimed to have been served personally, states that he was not. Messrs. Kerans and Davis, claimed to have been served pursuant to New York Civil Practice Law and Rules § 308(2) (service upon person of suitable age and discretion plus mailing) both state that they have not received the summons and complaint in the mail.

The dispute over whether the individual defendants had, or had not, when the petition was filed, been served, however, need not be resolved to determine the motion. As to any individual defendant who might be found not to have been served, his failure to join in the petition does not defeat removal. *Browne Bros. Cyper Corp. v. Carver Bank of Miami, Fla.*, 287 F. Supp. 700, 702 (S.D.N.Y. 1968). On the other hand, as to any individual defendant who might be found to have been served, the defect is curable. *Sicinski v. Reliance Funding Corporation*, 461 F. Supp. 649, 652 (S.D.N.Y. 1978). Here, the affidavits to Messrs. Kerans, White and Davis all state that they consent to the removal. In *Sicinski*, Judge Pollack, after the time for removal had passed, accepted an affidavit of a defendant, which had not signed the petition, which he "held to cure any defect in the original petition." *Id.* If necessary, the Court accepts the affidavits of Messrs. Kerans, White and Davis, to the extent that they state their respective consents to removal, as curing the defect in the petition that might be found had they been served as of the date of its filing.

Mr. Davis' affidavit is sufficient, for purposes of the present motion, to establish that he is a citizen of the State of Connecticut for diversity purposes. That he is alleged to have a "business residence" at a New York office of

defendant Crane & Co., or a subsidiary of defendant Crane & Co., and concedes working out of such an office, is immaterial. It is Mr. Davis' domicile that governs. *Vitro v. Town of Carmel*, 433 F. Supp. 1110, 1112 (S.D.N.Y. 1977).

Plaintiff's motion for sanctions is denied.

Plaintiff will submit papers in opposition to defendants' motion to dismiss, and defendants will submit papers in opposition to plaintiff's motion for a preliminary injunction, not later than February 21, 1991.

Dated: New York, New York
February 13, 1991

SO ORDERED.

LAWRENCE M. McKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BEEKMAN PAPER COMPANY, INC., :

Plaintiff, : 91 Civ. 0031 (LMM)

-against- : MEMORANDUM AND ORDER

CRANE & CO., INCORPORATED, RICHARD W. KERANS, THOMAS A. WHITE, and HAMILTON DAVIS, :

Defendants. :

----------x

McKENNA, D.J.

This action was commenced on December 12, 1990, in the Supreme Court of the State of New York, New York County, by service of the summons and complaint on defendant Crane & Co., Inc. ("Crane"). On January 2, 1991, the action was removed to this Court. On January 24, 1991, plaintiff, Beekman Paper Company, Inc. ("Beekman"), moved, by order to show cause, to remand the action to the Supreme Court, and, on February 13, 1991, the motion to remand was denied.

Beekman, at the same time that it moved for remand, moved for a preliminary injunction against Crane's

termination of Beekman as a distributor of paper manufactured by Crane.

Crane moves to dismiss the complaint for failure to state a claim upon which relief can be granted.

According to Beekman's allegations, Crane is a manufacturer of high quality paper, which Beekman has distributed for more than 25 years pursuant to an oral agreement under which, together with the customs and usages of the paper trade, Beekman was to continue as a distributor so long as Beekman distributed Crane's products in a satisfactory manner. By letter dated October 30, 1990, Crane terminated Beekman as a distributor, effective February 28, 1991.

Beekman asserts six claims: (1) and (2) for breach and for anticipatory breach of contract and the customs and usages of the trade, against Crane; (3) for intentional interference with contractual relations, against all defendants[1]; (4) for conspiracy, against the individual defendants; (5) for trade disparagement, against all defendants; and (6) for punitive damages, against all defendants. The complaint does not seek injunctive relief.

The complaint does not specifically allege the area of Beekman's distributorship. From the papers submitted, it appears to have been largely, if not exclusively, concentrated

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1 The defendants other than Crane are its president, Thomas A. White, its Manager, Business Papers Division, Richard W. Kerans, and a sales representative with regional responsibility for the New York City area, Hamilton Davis.

in New York City. In any event, the parties have argued the motion to dismiss on the basis of New York law, and neither party has suggested that the law of any other state is to be applied.

Beekman does not allege that it was a party to a written contract with Crane, and it is clear that, its allegations of the customs and usages of the trade apart, its first and second claims--for breach and anticipatory breach of contract--must be dismissed because the contract alleged is unenforceable under the Statute of Frauds. *D&N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 483 N.Y.S.2d 164 (1984).

Beekman argues, however, that it is the custom and usage of the paper trade that oral distribution contracts are not terminable at will, unless the distributor fails to sell in a satisfactory manner. For purposes of Crane's motion to dismiss, this allegation will be taken to be true.

The customs and usages of a trade are not infrequently resorted to in the effort to construe a contract. *See Edison v. Viva International, Ltd.*, 70 A.D.2d 379, 421 N.Y.S.2d 203, 205 (1st Dep't 1979); *U.S. Naval Institute v. Charter Communications, Inc.*, 875 F.2d 1044, 1048 (2d Cir. 1989); *Seven Star Shoe Co., Inc. v. Strictly Goodies, Inc.*, 657 F. Supp. 917, 920 (S.D.N.Y. 1987). In the cited cases, however, reference to customs and usages was made in order to determine the parties' intent in using specific language in a written agreement. *See also, Stulsaft v. Mercer Tube & Mfg. Co.*, 288 N.Y. 255 (1942) (looking to the parties' prior relationship, the custom of the trade and the custom of the defendant in dealing with employees in a situation similar to

that of the plaintiff, in order to supply a commission rate in an agreement to employ the plaintiff for a specified term).

Beekman relies principally on *VistaTech Enterprises v. Brother International*, 677 F. Supp. 178 (S.D.N.Y. 1988), where the plaintiff had been appointed a distributor by an oral agreement not specifying the term of the distributorship, "whether at will or forever." *Id.* at 180. The Court found that "[n]either alternative could have been in contemplation of the parties as a matter of common sense and the economics of trade. On the one hand, the distributor would have to have products available to sell for a reasonable period after issuing its advertisement [approximately two weeks prior to the termination], and on the other, in the absence of any further agreement, VistaTech could not anticipate a perpetual relationship." *Id.* The Court found a custom and usage of "the quotation of prices for a two month period by VistaTech to the trade, a practice known to Brother and made evident by the VistaTech flier." *Id.* at 180-181. The Court found that its construction of the agreement was a "means by which the agreement can be upheld" against the defense of the Statute of Frauds. *Id.*[2] VistaTech was allowed damages for the two month period following termination, but its motion for an injunction against termination was denied. The Court did not construe the agreement as having a "perpetual" term.

*VistaTech* does not support Beekman's position that the customs and usages of the paper trade may require that an oral distributorship agreement, silent as to its term, be

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2 The Court in *VistaTech* also found the Statute to have been satisfied by two memoranda. *Id.*

construed as lasting forever, in complete disregard of the Statute of Frauds. Such authority as has been called to the Court's attention indicates, rather, that custom cannot "give validity to a contract which the law declares void." *Stulsaft*, *supra*, 288 N.Y. at 260. (Citation omitted.) *See also, Ozier v. Haines*, 411 Ill. 160, 103 N.E.2d 485, 489 (Sup. Ct. 1952) ("We conclude . . . that the customs pleaded could not render nugatory the provision of the Statute of Frauds.")

The first and second claims are, therefore, dismissed. That dismissal, furthermore, requires the denial of Beekman's motion for a preliminary injunction against termination, since that motion is premised on those causes of action.

There is also independent ground for denial of the preliminary injunction sought. Beekman has not made a sufficient showing that termination will cause irreparable injury. It is evident from the papers submitted that Beekman distributes paper products manufactured by companies other than Crane. It appears that the reason proffered by Crane for termination was Beekman's concentration, to the detriment of Crane (at least in Crane's view), on distribution of foreign manufactured paper. Indeed, Beekman's executive vice-president states that "it is precisely the development of foreign sources of paper as a compliment to Beekman's domestic sources that has kept Beekman alive and flourishing in the modern, 1990s world of international business as carried on in the paper industry." In a letter dated July 2, 1990, to defendant Kerans, arguing against termination, Beekman's president states that "[i]n 1983 we were able to obtain the distributorship of two of the worlds' largest producers of coated paper both of which are located in

Europe. Thanks to hard work and good marketing we are now in the position of being able to supply over $8,000,000 of coated paper from stock at twenty-three locations around the country." The same letter also refers to Beekman's distribution of uncoated paper manufactured by U.S. based "mills" (emphasis added) and Beekman's "financial strength to survive." What Beekman's submissions do not contain is specific and detailed information -- such as, for example, a breakdown of Beekman's sales of paper manufactured by Crane and by other distributors, either in general or by customer -- supporting a claim that loss of the Crane distributorship will have the sort of impact on Crane that could not be redressed by money damages.[3]

Beekman's third claim alleges that Crane and the individual defendants, since 1988, "have intentionally and without justification sought to induce clients of Beekman's to cease purchasing Crane paper from Beekman and/or from doing business with Beekman," and that Beekman's agreements with its clients "have been interfered with." The complaint does not allege, however, that any of the agreements between Beekman and its customers have been breached by the customers, and is deficient in that respect. *See Printers II, Inc. v. Professionals Publishing, Inc.*, 615 F. Supp. 767, 774 (S.D.N.Y. 1985), *aff'd* 784 F.2d 141 (2d Cir. 1986). The claim is therefore dismissed, with leave, however, to replead. If the individual defendants are to be renamed in the repleaded claim, the claim must allege facts

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3 The complaint, it may be added, seeks money damages for the alleged breach of contract and the customs and usages of the trade, not specific performance or an injunction -- preliminary or final -- against termination.

sufficient to justify their inclusion. *See Courageous Syndicate v. People-to-People*, 141 A.D.2d 599, 600, 529 N.Y.S.2d 520, 521 (2d Dep't 1988).

Beekman's fourth claim alleges that all of the defendants conspired "to commit the wrongful acts aforepleaded," *i.e.*, breach and anticipatory breach of the agreement between Beekman and Crane, and interference with Beekman's agreements with its customers. Since Beekman's first and second claims relating to breach of the Beekman-Crane agreement are dismissed for the reasons set forth above, the fourth claim, as it relates to that agreement, is also dismissed. Insofar as the fourth claim relates to Beekman's agreements with its customers, it is not clear that it adds much if anything to the third, which names all defendants. Beekman may, however, replead the fourth claim as it relates to Beekman's agreements with its customers should it be so advised, but the claim as repleaded must satisfy the requirements of particularity as to overt acts set forth in *Weg v. Macchiarola*, 654 F. Supp. 1189, 1193-1194 (S.D.N.Y. 1987).

Beekman's fifth claim alleges that the defendants, beginning in 1988, communicated to Beekman's competitors and former and current employees and salespeople that Beekman was going out of business and was going to lose the Crane account, and also that Crane sought to induce Beekman employees and salespeople to leave Beekman.

The first aspect of the fifth claim--communications to the effect that Beekman was going out of business and would lose the Crane account--appear to sound in injurious falsehood or disparagement. *See Diehl & Sons, Inc. v.*

*International Harvester Co.*, 445 F. Supp. 282, 291-292 (E.D.N.Y. 1978). The complaint does not allege, however, either that the statements alleged were false, or special damages, as required.[4] Beekman may replead in a manner satisfying these requirements.

The thrust of the second aspect of the fifth claim--inducement of Beekman employees and salespeople to leave Beekman--is not entirely clear. If it is intended as a claim of injurious falsehood, it fails to allege falsity and special damages. If it is intended to allege interference with contractual relations, it fails to allege that any employment agreements with Beekman were breached. Beekman will be allowed to replead this aspect of the fifth claim, however, in a manner that clarifies the tort it asserts, and satisfies the pleading requirements of that tort.

Beekman's sixth cause of action seeks punitive damages. New York law does not recognize a separate claim for punitive damages, *see Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 38, 544 N.Y.S.2d 359, 370 (2d Dep't 1989), and the claim is dismissed, with leave, however, to add

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4 Crane urges that "any statements regarding Crane ending its relationship with Beekman would be true." While that may be the case from the time Crane decided to terminate Beekman's distributorship, there is no basis in the present record for finding that such statements were true beginning in 1988, when, Beekman alleges, they began. As to special damages, *see Brignoli v. Balch Hardy and Scheinman, Inc.*, 645 F. Supp. 1201, 1208 (S.D.N.Y. 1986). In *Diehl*, Judge Neaher noted that some cases did not require that special damages be pleaded, at least in certain situations, but in any event excused the pleading requirement in the case before him in view of deposition testimony before him on a motion for summary judgment. 445 F. Supp. at 292.

punitive damages to the *ad damnum* clauses of an amended complaint.

**Conclusion**

Beekman's motion for a preliminary injunction is denied. The complaint is dismissed, with leave to replead the third, fourth and fifth claims, and the *ad damnum* clauses, as set forth above, and without leave to replead the first, second and sixth claims. An amended complaint, if Beekman chooses to file one, is to be served and filed within 20 days of the date of this order.

Dated: New York, New York
February 28, 1991

SO ORDERED.

LAWRENCE M. McKENNA
U.S.D.J.